SUPREME COURT, U. S.

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IN THE

# Supreme Court of the United States

SEPTEMBER TERM 1969

No. 318

MRS. FANNIE LOU HAMER, *et al.*,

*Petitioners,*

*vs.*

SAM J. ELY, JR., *et al.*,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## Opinions Below

Petitioners moved, in the United States District Court for the Northern District of Mississippi, to set aside the election for municipal officers of the town of Sunflower, Mississippi, held on May 2, 1967. The motion was denied by the District Court. The order and opinion of the court are annexed hereto as Appendices B & C.

On appeal of the decision to the United States Court of Appeals for the Fifth Circuit, the judgment was affirmed. The opinion of the Court of Appeals is annexed hereto as Appendix A.

## Jurisdiction

The jurisdiction of this court is conferred by 28 U. S. C. 1254(1). The judgment to be reviewed was entered on April 10, 1969.

## Questions Presented

(1) Whether the refusal to permit illiterate black voters to obtain assistance from black election officials deprived those voters of their right to vote free from racial discrimination as guaranteed by the Fifteenth Amendment and federal laws?

(2) Whether the last minute refusal by the white Election Commissioners to permit black persons to performing any but ministerial functions at the polling place violated the Thirteenth, Fourteenth and Fifteenth Amendments to the United States Constitution?

## Statutes and Constitutional Provisions Involved

(1) 42 U. S. C. 1973, the Voting Rights Act of 1965, and particularly Section 1973l(c)(1). See Appendix D.

(2) The Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States.

## Statement of the Case

On May 2, 1967, an election was held in the town of Sunflower, Mississippi, to select a mayor and five aldermen under special order of the United States District Court in accordance with the ruling of the United States Court of Appeals for the Fifth Circuit in the case of *Hamer* v. *Campbell*, 358 F. 2d 215 (5th Cir. 1966), cert. denied, 385 U. S. 851 (1966).* There were white and Negro candidates for all of these offices. There was one Negro and one white candidate for Mayor. Five white candidates and six Negro candidates sought the five aldermanic offices. No Negro candidate was elected.

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* In *Hamer* v. *Campbell* the Court of Appeals set aside an election on the basis that Negroes had been denied the opportunity to participate in the electoral process.

During the course of preparation for the May 2, 1967 election it became evident that a substantial number of illiterate Negro voters would need assistance in marking their ballots and casting their votes (R. 37-41). Of the persons eligible to vote in the May 2 election, there were 193 Negroes and 160 white persons (R. 37). An employee of the Delta Ministry of the National Council of Churches, Mr. Harris, conducted a survey to determine the number of Negroes who needed assistance in marking their ballots. Of 156 survey forms returned, the voters returning 56 forms—some relating to both husband and wife—stated that they did need assistance (R. 38). A practice election was held on April 28, 1967 and it was found that over one-third of the 128 persons who participated needed assistance in marking their ballots (R. 10-11, 20).

The matter of obtaining assistance for illiterate Negro voters was viewed as of vital importance, and the attorneys for the plaintiffs were requested to take action "to see if they could get the kind of assistance" that such voters needed (R. 38). The "kind of assistance" they needed was assistance from persons whom the voters trusted and in whom they had confidence (R. 39).

During the weeks before the election, attorneys for the plaintiffs took up this matter and arrived at an understanding with Mr. Wells, counsel for the defendants and an assistant Attorney General of Mississippi. Mr. Wells explained the agreement in a stipulation appearing in the record (R. 44):

> "That sometime in the latter part of April, prior to the election in May, that I conferred with Mr. Stavis, at the Attorney General's office in Jackson, discussing the coming election, and I did advise him at that time that it was my understanding, based

on conversations which I had had with Mr. Oscar Townsend, who is attorney for the Town of Sunflower, that there would be two Negro men who would be appointed as election officials, clerks, for the holding of that election, and that I further understood that one of them was Joseph Harris;

That it was further my understanding, based on my conversations, that in the matter of aiding and assisting illiterates, that those two Negro men would be authorized to assist any illiterate who requested that they aid them in casting their ballots;

That on the day before the election . . . it was still at that time my understanding that that would be the procedure."

At a series of meetings on April 30 and May 1, 1967, voters were assured by counsel for the plaintiffs that Negro voters who required assistance at the polls would be permitted to have the assistance of one of the Negro election officials (R. 105-108). The matter of assistance to illiterates was one of the key problems in connection with the election. More than 100 Negro voters attended a mass meeting on April 30 and received assurance of the right to have Negro assisters. More than 50 persons attended an afternoon meeting on May 1 and between 50 and 75 attended an evening meeting on that day. Both groups were given similar assurances.

A meeting of the Election Commissioners of Sunflower was held on the evening of May 1, 1967, at the same hour as the last meeting of the Negro voters described above. Immediately preceding the formal meeting of the Commissioners, Assistant Attorney General Wells was heard to urge the Commissioners to allow the Negro voting offi-

cials to assist the illiterate Negroes in accordance with the agreement in effect up to that time (R. 48). During the formal meeting which followed, however, the Commissioners announced for the first time that only the members of the Election Commission—Mr. Parker, Mr. Edwards and Mr. Labovitz—would be permitted to aid illiterate Negroes in casting their ballots (R. 49). One of the Negro election officials attending the meeting protested, but to no avail.

All of the three Election Commissioners were white persons. Mr. Parker is a plantation owner and was seeking office as Sheriff of the County. He had previously been Chief Deputy of the County (R. 52). His brother was a candidate for Alderman in the May 2 election. Mr. Labovitz operates a grocery store where Negroes frequently purchase goods on credit (R. 14, 53).

Following the Election Commissioners' meeting, the Negro election official who had been present hurried to the community center where the mass meeting of voters was taking place, but the mass meeting was being adjourned when he arrived. Attempts were made to reassemble the people at the meeting for the purpose of advising them that the election procedures had been changed and that Negro election officials would not be permitted to assist illiterate Negro voters. It was not possible to reassemble the voters in order to convey this information to them (R. 50, 108-109). Following news of the reversal of the understanding on voter assistance, one of the attorneys for plaintiffs drove to Indianola, Mississippi and spoke to Assistant Attorney General Wells, who confirmed that the Election Commissioners had in fact decided that no Negro election official would be permitted to give assistance to illiterate voters (R. 75).

Still later that night, May 1, 1967, attorneys for the plaintiffs prepared a letter to the Board of Election Commissioners protesting their decision and demanding that illiterate voters be assisted, if they so chose, by a Negro election manager (R. 28-29). Arrangements were made by telephone about midnight for the letter to be received by Mr. Townsend, attorney for the local officials, at about 6:30 A.M. on May 2 at the polling place in the City Hall of Sunflower prior to the opening of the polls (R. 76-77).

In addition to stipulating to the understanding that Negro election managers would be permitted to give voting assistance, Mr. Wells testified in detail as to how the understanding was reached and to the last minute reversal of that understanding by the Board of Election Commissioners. After discussions in person and by telephone —with plaintiffs' attorneys, Mr. Stavis and Mr. Bronstein, and with Mr. John Doar of the United States Department of Justice, Mr. Wells recommended to attorney Townsend, counsel for the local officials, that one or two Negroes be appointed as election officials for the May 2 election in Sunflower and that they be permitted to assist illiterate Negro voters in marking their ballots (R. 159-160). Mr. Townsend agreed.

At about 5:00 P.M. on the Saturday afternoon preceding the election, Mr. Wells learned through a telephone call from Mr. Doar, that Sunflower County had been designated as an area to which federal examiners and federal observers would be sent to observe the election on the coming Tuesday (R. 161). At a luncheon meeting on Monday, May 1, however, Mr. Wells still understood that the two Negro election officials would be permitted to give assistance to the illiterate voters and so advised Mr. Bronstein and Mr. Stavis, attorneys for the plaintiffs (R. 45).

Mr. Townsend, local attorney for the Sunflower officials, and Mr. Allen, attorney for the officials of the Town of Moorhead, were also present at the May 1 luncheon and everyone present understood that the agreement would be followed.*

Mr. Wells further testified that at the conference with the Sunflower Election Commissioners prior to their formal meeting around 7:00 P.M. on May 1, he was still of the opinion that the Negro election officials should be able to assist voters and that, at least initially, he urged the Election Commissioners to permit these officials to do so. Mr. Wells, however, did not continue to insist that the Negro officials be appointed as assisters. His explanation is that he ceased his insistence upon learning for the first time one of the Negro election officials, Mr. Harris, had been campaign manager for five Negro candidates for alderman and the Negro candidate for Mayor. Mr. Wells felt that Mr. Harris was not impartial. Mr. Wells also took into account the fact that the federal observers would be present and would be permitted to enter the voting booth, if requested by voters, to observe aid being given to illiterates (R. 162-163). When Mr. Wells ceased insisting, the three Election Commissioners appointed themselves as the only persons who would be permitted to give assistance to illiterate voters.

Mr. Wells conceded that Mr. Parker, one of the Election Commissioners, might not be considered impartial any

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* The circuit court's earlier decision in *Hamer* v. *Campbell*, *supra*, also involved an earlier election in Moorhead. As a consequence, the District Court ordered a new election to be held in the municipality on May 2, 1967. The Election Commissioners of Moorhead did allow illiterate voters to receive assistance from Negro election officials, and no issue as to the May 2 election in Moorhead was involved in the appeal (R. 77).

more than Mr. Harris, inasmuch as Mr. Parker's brother was a candidate for Alderman in the May 2 election. It is clear that there was no legal requirement that the persons providing assistance to illiterate voters be an impartial person with respect to the candidates and that there was no impediment to the appointment of the two Negro election officials as assisters (R. 169-170).

At the election on May 2 the two Negro election officials were permitted to serve only ministerial functions. The function assigned to Mr. Harris was to inscribe the names of the voters in a book (R. 50-51). The job of Mr. Bell, the other Negro official, was to stand near the ballot box and place ballots in the box as they were handed to him by the voters (R. 13).

### Assisted and Irregular Ballots

Thirty-one voters received assistance in casting their ballots (R. 136-137). On these ballots there were 12 votes for the white Mayoral candidate and 19 votes for the Negro candidate. As to the aldermanic race, all votes on four of the assisted ballots were for white candidates only. Nineteen of the assisted ballots contained votes only for Negro candidates for alderman, and eight assisted ballots contained votes split between the white and Negro candidates for alderman (R. 136-137).

Although only 326 persons voted in the election, 38 ballots were marked irregular at the tally on the night of the election (R. 81, 132). These 38 ballots are exclusive of 30 of the ballots marked "assisted"; one assisted ballot was also an irregular ballot (R. 85). A canvass was held on the day after the election, and the Election Commissioners ruled at that time whether to accept or reject each of the irregular ballots (R. 82-89). The Commission-

ers accepted 11 of the irregular ballots and rejected 27. Of the 27 ballots which were rejected, 14 had votes for Negro candidates only; 11 ballots had votes split between Negro and white candidates, and two rejected ballots contained votes only for white candidates (R. 88-89). Of the 11 irregular ballots that were accepted, eight had votes for Negro candidates only; two contained votes split between white and Negro candidates and one had votes for white candidates only. Where votes on ballots were split between Negro and white candidates, in almost every case most of the votes were for Negro candidates while white candidates had received one or two votes on such ballots. On the 27 irregular ballots rejected by the Election Commissioners the voters are distributed as follows: there were a total of 90 votes for Negro candidates for alderman and a total of 25 votes for white candidates for alderman. In the Mayor's race, there were 17 votes for the Negro candidate and 10 votes for the white candidate (R. 137).

At the canvass held May 3, Mr. Labovitz, one of the Commissioners, when shown a ballot containing no marks but which had imprints as though the voter had tried to write through another piece of paper marked, "I saw people laying their sample ballot on top of the real ballot and try to mark through" (R. 91). Mr. Edwards, another Election Commissioner, was shown a ballot containing only one mark and said, "She probably couldn't read and was afraid to ask for help". Both of these comments and these situations were considered amusing to Commissioners Labovitz and Edwards (R. 91).

## Proceedings Below

In denying plaintiffs' motion to set aside the May 2 election, the District Court found that "this election was conducted in a completely fair, objective way and that the

results thereof truly represent the will of a majority who voted." (15a). The Court did find that the plaintiffs believed in good faith that the Election Commissioners would name a Negro election official to assist Negro illiterate voters and that Mr. Wells had so advised the plaintiffs. The Court further found that the plaintiffs were unable to get news to all the voters of the change of situation resulting from the decision of the Election Commissioners to the contrary on the eve of the election and that this "caused some confusion and resulted in misunderstanding." (15a).

The Court found that the plaintiffs understood that only one Negro election official, Joseph Harris, would be permitted to give assistance and that the plaintiffs had only proposed the name of this single individual. In concluding that Mr. Harris was not impartial, the Court relied heavily on the fact that Harris was campaign manager for five of the Negro candidates for alderman and one candidate for mayor. The Court completely ignored the obvious impartiality of Mr. Patterson, one of the Election Commissioners who did render assistance to Negro voters, and the fact that Mr. Wells stipulated that the agreement was that *two* Negro officials would give assistance.

The Court also required proof that the irregular ballots containing large numbers of votes for Negro candidates were cast by Negro voters and found a failure of proof in the record in this regard. Thus the Court concluded that the presence of the extraordinary number of irregular ballots could not be viewed as supporting plaintiffs' argument that many Negro voters declined to request aid, although needing assistance, so as to prevent the white community from knowing how they voted.

On appeal to the Court of Appeals for the Fifth Circuit the judgment of the District Court was affirmed. Although recognizing that ". . . the attitude of Sunflower's Election Commissioners may have been shoddy . . ." the court held that the assistance provided by the Election Commissioners fulfilled the requirement of "reasonable assistance" as set forth by the United States District Court in *United States* v. *Mississippi*, 256 F. Supp. 344, 349 (S. D. Miss., 1966).

## Reasons for Granting the Writ

The writ should be granted because the decision of the Court of Appeals below determined an important question of law which has never been, but which should be, fully considered and decided by this Court.

Looking back over his sixteen years as Chief Justice of this Court, former Chief Justice Earl Warren concluded that the most important cases this Court decided during his tenure were those dealing with the right to vote, ensuring that ". . . everyone in this country has an opportunity to participate in his government on equal terms with everyone else and can share in electing representatives who will be truly representative of the entire community. . . ." *New York Times*, June 27, 1969, p. 17.

The critical importance of the right to vote was emphasized in debates before the United States Congress concerning the Voting Rights Act of 1965:

> "In our system of government, there is no right more central and no right more precious than the right to vote.
>
> From our early history, the free and secret ballot has been the foundation of America."

Statement of Attorney General Nicholas deB. Katzenbach, Cong. Rec., 89th Cong., 1st Sess., March 24, 1965, p. 5807.

At this particular time in our history when both the problems and the frustrations of the Nation and its citizens are so great it is particularly important that a truly meaningful exercise of the right to vote is available to all who are eligible to vote, for as President Wilson noted before the Congress in 1919,

> "The instrument of all reform in America is the ballot." Cong. Rec. *supra.*

This case raises most important, though subtle questions as to the extent and nature of the guarantee of the right to vote for the most disadvantaged persons in our society. Ensuring full and meaningful participation in the electoral process for illiterate voters is a difficult task but perhaps one of the most significant, for they are the least able to ensure their own full participation in our system of democracy. Our country is now facing many grave problems. If the ballot is to remain the means for solving them, it must not only be available to all, but all must be able to make use of their ballot in a meaningful fashion.

## I.

**The refusal to permit illiterate black voters to obtain assistance in casting their ballots from black election officials violated the Voting Rights Act of 1965 and the Fifteenth Amendment to the Constitution.**

There can be no question that the right to vote includes the right of illiterate voters to have assistance in casting their ballots. *United States* v. *Mississippi,* 256 F. Supp. 344, 348 (S. D. Miss., 1966); *United States* v. *Louisiana,* 265 F. Supp. 703, 708 (E. D. La., 1966). As the court said in *Morris* v. *Fortson,* 261 F. Supp. 538, 540 (N. D. Ga., 1966): "Indeed, illiterate voters *must* be rendered assistance in order to effectuate their constitutional right to vote." See also, *United States* v. *Executive Committee of the Democratic Party, etc.,* 254 F. Supp. 543 (N. D. Ala., 1966).

Similarly, the right to vote constitutionally includes the right to be free from intimidation and coercion in the exercise of the franchise. *United States* v. *Original Knights of Ku Klux Klan,* 250 F. Supp. 330 (E. D. La., 1965). Nor may the voting fate of the citizens be left to the "passing whim or impulse" of an election official. *Louisiana* v. *United States,* 380 U. S. 145, 153 (1965).

There is no denial that the Negro voters requesting aid in the May 2, 1967 Sunflower election were in fact given assistance—by the three white Commissioners. There was thus no outright denial of assistance to illiterate voters. But, as Mr. Justice Frankfurter aptly observed: "The [Fifteenth] amendment nullifies sophisticated as well as simple-minded modes of discrimination." *Lane* v. *Wilson,* 307 U. S. 268, 275 (1939).

The question therefore becomes whether or not under the circumstances of the particular situation before the Court the denial to illiterate Negro voters of the right to obtain assistance from Negro election officials was violative of the rights guaranteed by the Fifteenth Amendment and the federal voting rights statutes. It is a question of whether the assistance which was given was a fulfillment of the duty and responsibility of the election officials "to provide to each illiterate voter who may request it, such *reasonable* assistance as may be necessary to permit such voter to cast his ballot in accordance with the voter's own decision," and whether such assistance constituted "suitable arrangements" for assistance. *United States* v. *Mississippi*, 256 F. Supp. 344, 348, 349 (S. D. Miss., 1966).

As the Court of Appeals below pointed out:

> "The requirement of voter assistance stems from the Voting Rights Act, specifically 42 U.S. C.A. §1973l(c)(1) which defines the terms 'vote' and 'voting' as including 'all action necessary to make a vote effective. . . .' As the three-judge court said in *United States* v. *State of Louisiana*, E.D. La. 1966, 265 F. Supp. 703, 708, aff'd — S. Ct.—:
>
> > 'We cannot impute to Congress the self-defeating notion that an illiterate has the right [to] pull the lever of a voting machine, but not the right to know for whom he pulls the lever.'
>
> "In light of this requirement, it becomes
>
> > '. . . the duty and responsibility of the precinct officials at each election to provide each illiterate voter who may request it such reasonable assistance as may be necessary to permit such voter

to cast his ballot in accordance with the voter's own decision." United States v. State of Mississippi, S.D. Mississippi, 1966, 256 F. Supp. 344, 349.'" (6a)

This Court needs no demonstration of the wholesale disenfranchisement of Negro citizens in the State of Mississippi nor of the tenacity with which officials in Mississippi have sought to maintain their policy of white supremacy by unconstitutionally denying Negro citizens the right to vote. The history is spread upon the decisions of this Court and other courts. E.g. *United States* v. *Mississippi,* 380 U. S. 128 (1965); *United States* v. *Ramsey,* 353 F. 2d 650 (5th Cir. 1965), 353 F. 2d 350; *United States* v. *Lynd,* 349 F. 2d 785 (5th Cir. 1965); *United States* v. *Ward,* 345 F. 2d 857 (5th Cir. 1965); *United States* v. *Dogan,* 314 F. 2d 767 (5th Cir. 1963); *United States* v. *Mississippi,* 256 F. Supp. 344 (S. D. Miss., 1966); *Hamer* v. *Campbell,* 358 F. 2d 215 (5th Cir. 1966).

This very case furnishes graphic proof of the intent, as well as the prior success, of Sunflower officials in depriving Negro citizens of their rights to register and vote. Thus the Court of Appeals pointed out in *Hamer* v. *Campell, supra,* that the District Court had found in its earlier decision in this matter (in which the Court entered a "freeze" order to allow the deprived Negroes "to catch up and participate in the electoral process") that Negro citizens had been deprived "for many, many years" of their right to register and vote. As late as 1965 the District Court found that although Negroes of voting age in Sunflower County outnumbered white persons of voting age by 13,524 to 8,785, only 155 Negro citizens or 1.1% were registered to vote, while 80% of the white citizens were registered.

In the face of such a record, it could not reasonably be assumed that either the Negro citizens or the white election officials in Sunflower had so soon forgotten their recent history that a truly free election could have been held May 2, 1967 except under circumstances particularly tailored to assure the Negro voters of the greatest degree of confidence in the secrecy of their ballots. It was with full recognition of the past denials to Negroes of adequate education, the economically dependent status of the Negro community and the virtually complete denial of the franchise in the past that the plaintiffs and other Negro citizens were duly cautious that disclosure of illiterate Negro voters' ballots to white assisters would engender such fear of economic reprisals as to deprive such Negro voters of the right to cast a free ballot. The assisting process necessarily destroys the secrecy of the ballot, but for an illiterate Negro voter in Sunflower to disclose his ballot to a Negro in whom he has confidence is an entirely different matter from being forced to disclose his ballot to a white person in the community.

There had been ample demonstration that more than 50 Negro voters would require assistance. Since the election was being held under court order, arrangements were therefore made with the State of Mississippi, through the Assistant Attorney General and with the attorney for the local officials, that two Negroes would be appointed as election officials and that these officials would be permitted to give assistance to illiterate Negro voters. The election officials were fully cognizant of the reliance of the Negro voters on the arrangements for Negro assisters at the polls and of the expectations of the Negro voters that the understandings would be carried out by the Election Commissioners.

The record is clear, as the District Court found, that the Election Commissioners' repudiation of the understanding on Negro voting assistants came too late to permit the plaintiffs and their supporters to get ward of the changed situation to all of the Negro voters. The District Court conceded that "this caused some confusion and resulted in misunderstanding" (R. 177). But these are indeed pallid words to describe what reasonably must have been the effect upon the illiterate Negro voters who were so abruptly faced with the reality of being forced to disclose their ballots to powerful white citizens of Sunflower.

The Court of Appeals below recognized that poor black illiterate voters might refuse to ask for assistance from white Election Officials ". . . because of a reluctance to disclose or fear of disclosing how they intended to vote." However, the Court below did not consider another very important problem—that of illiterate voters who, knowing they were unable to successfully cast their ballots alone, asked for assistance, but because the only assistance available was from prominent white citizens of Sunflower, were afraid to indicate their true choice of candidate to the white Election Officials. For years it has been an accepted fact among those concerned with conducting surveys that there is a significant difference in answers of black respondents if the interviewer is black or white.* What is more, when there is a great difference in social statute between the interviewer and respondent and when

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* Herbert H. Hyman, with Hart, Cobb, Feldman and Stember, *Interviewing in Social Research*, University of Chicago Press, Chicago, 1954, pp. 159ff: J. Allen William, Jr., "Interviewer-Respondent Interaction: A Study of Bias in the Information Interview," *Sociometry*, vol. 27, #3, Sept. 1964, pp. 338ff; Gerhard Lenski & John C. Leggett, "Caste, Class and Difference in the Research Interview," *The American Journal of Sociology*, vol. LXV, #5, March 1960, pp. 463ff.

the question is highly threatening there is even a greater likelihood that the answers will be falsified. It has been concluded that this is because "(m)any Negroes are economically dependent on whites and thus are especially vulnerable to immediate reprisal." Furthermore, "[l]ower class Negroes will feel great pressure to answer questions in the way which they believe conforms to what white interviewers expect or want them to say." Williams, *supra,* at p. 342.

Where could one find a greater difference in status than between an illiterate black resident of a small rural Mississippi community and a white official who represents both the economic and political power of the town. Furthermore, not only is there a general difference in status between the illiterate "voter—black respondent" and the "election official—white interviewer" and the question is highly threatening* but the "answer" is not merely an abstract matter of the opinion of the respondent but will contribute to the determination of just who will govern both the respondent and the interviewer—whether the persons governing will be white, or for the very first time, black. Furthermore, the "interviewers" were not simply persons of higher status. As noted above, the three persons assisting illiterates were the white Election Commissioners, one of whom was a plantation owner and former Chief Deputy of the County and was then seeking office as County Sheriff (R. 52). Another operated a grocery store where black people frequently purchased goods on credit (R. 14, 53).

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* Williams found a significant difference in response to white and Negro interviewers on the question of whether it is not a good idea to make changes in the way the country is run. Williams, *supra,* p. 346.

Discussing the events that acted as the catalyst for the passage of the Civil Rights Act of 1965, Attorney General Katzenbach stated, "[The story of Selma] also illustrates another obstacle, sometimes more subtle, certainly more damaging. I am talking about *fear.*" Cong. Rec. 89th Cong., 1st Sess., March 24, 1965, p. 5809. (Emphasis added.)

The same fear which once deterred black people from voting and which now might deter a poor illiterate black person from expressing his true voting preferences to a powerful white citizen regardless of the presence of a federal observer* would mostly probably deter him from later stating in court that he had "voted" for white candidates because he could only cast his vote with the help of an economically and politically powerful local white man and he was therefore afraid to indicate his true choice.** As this Court recognized in *Anderson* v. *Martin,* 375 U. S. 399 (1964) ". . . the most crucial stage in the electoral process [is] the instant before the vote is cast. . . ." This court must not permit the existence of a procedure in which a person is likely either to refrain from seeking necessary assistance in casting his ballot or incorrectly indicating his preference because of very real fears of retaliation from the very persons to whom he

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* Though the federal presence would doubtless preclude any chance of harassment of an illiterate voter by a white official in the voting booth, it could in no way protect the illiterate voter from harassment following the election such as loss of credit, or loss of a job.

** Had they realized that they would have to tell white town officials whom they wished to vote for in order to cast their ballots many black illiterate voters might not even have come to the polls. But as noted above, until they arrived at the polls they believed that they would be able to receive assistance from black officials as previously agreed (R. 105-109).

must turn for assistance. There must be provision for assistance for illiterate black voters by persons they can trust or for them the entire electoral process is vitiated.

## II.

**The refusal to permit any black persons to perform any but strictly ministerial tasks at the polling place violated the Thirteenth and Fourteenth Amendments to the Constitution.**

In setting aside an election in *Bell* v. *Southell,* 376 F. 2d 659 (5th Cir., 1967), the Court of Appeals stated that:

> "The fact is that there are certain practices which, apart from demonstrated injury or the inability to do so, so infect the processes of the law as to be stricken down as invalid. Virginia State Board of Elections v. Hamm, 1964, 379 U. S. 19, 85 S. Ct. 157, 13 L. Ed. 2d 91, affirming, 1964, 230 F. Supp. 156."*

Only last year this Court spoke of the importance of eliminating all of the badges and incidents of slavery and keeping the promise of the Thirteenth Amendment to the Constitution. *Jones* v. *Alfred H. Mayer, Inc.,* 392 U. S. 409 (1968). Both the decisions of this Court and recent legislation indicate the extreme importance of eliminating

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* Citing *Hamer* v. *Campbell, supra,* the Court of Appeals in *Bell* v. *Southwell* further ruled that the court should not consider whether the outcome of the election would have been different had the election been untainted when deciding whether to grant relief. See also *American Tool Workers* v. *Hartford,* 102 NLRB 1143 (1953); *Lane Drugstores, Inc.,* 88 NLRB 584 1950); *Hollywood Ceramics Co., Inc.,* 140 NLRB 221 (1962).

not only the fact, but the illusion and the feeling of inferiority of black people in this country. In *Brown* v. *Board of Education,* 347 U. S. 483, 494 (1954) this Court directed its attention to the "feeling" or "sense of inferiority" of black children who were forced to experience segregated education. More recently, in *Heart of Atlanta Motel* v. *United States,* 371 U. S. 241, 291 (1964), Justice Goldberg concurring noted that ". . . the primary purpose of the Civil Rights Act of 1964, however, as the court recognized and as I would underscore, is the vindication of human dignity and not mere economics."

In *Bell* v. *Southwell, supra,* the existence of segregated voting lines was considered by the Court of Appeals for the Fifth Circuit to sufficiently "infect" an election to require voiding it. The existence of segregated voting lines is constitutionally impermissible because it revives and in fact continues the historical identification of blacks as inferior and whites as superior. In an election in which black persons are seeking office it is most critical that the election itself be run in such a way that the image of inferiority is not continued. After hundreds of years of segregation both blacks and whites must overcome tremendous prejudices in order to even imagine black people running their government, let alone vote for black candidates. The very illusion of black inferiority would reinforce the old prejudices rather than help to eliminate them and would decrease the likelihood that either blacks or whites would cast their votes for black candidates. And therefore, ". . . it is not Negroes alone who suffer, it is the body politic as a whole, both Negro and white" *Bell* v. *Southwell, supra,* at 662.

By refusing at the last minute to have black persons serve in any but the purely ministerial capacities of inscribing names of voters in a book and placing ballots in

## CONCLUSION

the ballot box (R. 50-51, 13) when the black community knew that a black person was supposed to hold a position of authority, the stereotype of inferiority was perpetuated in an even more real and glaring way than by a symbolic maintenance of segregated lines, and in clear violation of the Thirteenth Amendment.

The issues presented in this petition are serious and substantial and raise important questions of the effectiveness and nature of our democratic system.

> "Our concern today is to enlarge representative government. It is to solicit the consent of all the governed. It is to increase the number of citizens who can vote. What kind of consummate irony would it be for us to act on that concern and in so doing to reduce the ballot, to diminish democracy?
>
> It would not only be ironic; it would be intolerable." Cong. Rec. 89th Cong. 1st Sess., March 24, 1965, p. 5812.

**The Petition for Writ of Certiorari should be granted and the judgment below reviewed by this Court.**

Respectfully submitted,

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# APPENDIX A

## Opinion of the United States Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

**No. 25610**

MRS. FANNIE LOU HAMER, *et al.*,

*Appellants,*

*vs.*

SAM J. ELY, JR., *et al.*,

*Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI

(April 10, 1969)

Before WISDOM, THORNBERRY, and GOLDBERG,

*Circuit Judges.*

WISDOM, Circuit Judge: May 2, 1967, was a historic day in the Town of Sunflower, Mississippi. That day there was an election to choose a mayor and five aldermen.[1] For most of the Negro electors, it was the first

[1] The election was held under order of the district court issued in accordance with this Court's decision in Hamer v. Campbell, 5 Cir. 1966, 358 F. 2d 215, *cert. den.* 385 U. S. 851. In that case we concluded that the district court should have enjoined the 1965 election; we ordered that the election be set aside and a new one held under a plan to be directed by the district court.

time in their lives that they could cast a ballot. Moreover, the Negroes, constituting a majority of the 900 residents of Sunflower, had a black candidate for mayor and six black candidates for the five aldermanic positions that were to be filled. The list of registered voters showed 190 Negro registrants and 160 white registrants.

The candidates campaigned vigorously. Negro leaders extended themselves to educate the voters, many of whom were illiterate, and to explain the mechanics of voting. Came election day. Sunflower overflowed with strangers. These were reporters, representing the wire services and newspapers, and broadcasters and cameramen, some of whom represented national television networks. The wires to Washington had hummed before the election. Three federal observers were present inside the polling place. A federal "team captain" came to the polling booth from time to time during the day. Two attorneys from the Department of Justice were on hand.

To the chagrin of the hardworking Negro campaigners, their candidate for mayor lost by a vote of 190 to 121. The five white candidates for aldermen won by votes of 180, 165, 165, 161, and 160 to 111, 105, 105, 104, 77, and 32.

It is easy to understand the feeling of the Negro candidates and their supporters. They felt that there must have been skullduggery at the polls. Indeed, with reason, they could and did say that the Board of Election Commissioners should have shown more consideration for the uninformed, often illiterate, Negro casting his first ballot. In a motion asking the district court to set aside the election, the plaintiffs focused their attack on

the Election Commission's refusal to permit illiterate Negro voters to have voting assistance from Negro election officials. After a hearing, the district judge found that the election "was conducted in a completely fair, objective way and that the results thereof truly represent the will of a majority who voted that day". On the record as a whole, we cannot say that the district court erred.

I.

The campaign manager for the Negro candidate for mayor and for five of the six Negro candidates for aldermen was Mr. Joseph Harris. He was not a registered voter in Sunflower but he was an employee of the Delta Ministry of the National Council of Churches who had been active for several years in encouraging Negroes in the Delta to register. In preparing for the election, Mr. Harris conducted a survey to determine the number of Negro voters who would need assistance in marking their ballots. Based on this survey and a practice election, he concluded that over one-third of the Negro voters would need assistance at the polls. Attorneys for the plaintiffs discussed this key problem with Mr. Will Wells, counsel for the defendants and an Assistant Attorney General for the State of Mississippi, and arrived at an "understanding". Mr. Wells testified:

> That sometime in the latter part of April, prior to the election in May, that I conferred with Mr. Stavis, at the Attorney General's office in Jackson, discussing the coming election, and I did advise him at that time that it was my understanding, based on conversations which I had had with Mr. Oscar Townsend, who is attorney for the Town of Sunflower, that there would be two Negro men

> who would be appointed as election officials, clerks, for the holding of that election, and that I further understood that one of them was Joseph Harris;
>
> That it was further my understanding, based on my conversations, that in the matter of aiding and assisting illiterates, that those two Negro men would be authorized to assist any illiterate who requested that they aid them in casting their ballots;
>
> That on the day before the election . . . it was still at that time my understanding that that would be the procedure.

On the evening of May 1, while the Negroes in Sunflower were being assured at a meeting that they would receive voting assistance, the Board of Election Commissioners held a meeting. General Wells urged the Commissioners to allow Negro voting officials to assist Negro voters. The Board of Commissioners, however, decided that only members of the Commission were permitted to render aid to illiterate voters. In addition, there is some indication that the Commission considered that Mr. Harris, both because he was not a registered voter in Sunflower and because he was Campaign Manager of six of the seven Negro candidates, would be an inappropriate choice for an election official. All three commissioners are white. To make matters worse, so the plaintiffs say, one of the commissioners is "a plantation owner" who was running for County Sheriff; he had been a deputy sheriff; and his brother was a candidate for alderman in the May 2 election. Another commissioner operates a grocery store where Negroes frequently purchase goods on credit.

*Appendix A*

The Commission did appoint two Negroes to serve as election officials but they were assigned only ministerial functions. Mr. Harris inscribed the names of the voters in a book. The other Negro official stood near the ballot box and placed ballots in the box as they were handed to him by the voters.

The plaintiffs contend that many illiterate Negro voters cast their ballots without aid, rather than disclose how they voted. In support of this contention they point to the fact that there were 27 rejected irregular ballots. The plaintiffs assume that these ballots were all cast by Negroes. This is not necessarily true. In *Bell* v. *Southwell,* 5 Cir. 1967, 376 F. 2d 659, 662, in setting aside an election, we pointed out:

> ". . . the trial court legally could not assume—as it evidently did—that all white voters would vote for white candidates, all Negroes for Negroes, or that no whites would vote for Negroes in a free, untainted election."

An analysis of the rejected and assisted ballots is inconclusive. On election night 38 ballots were marked "irregular", exclusive of 31 ballots marked "assisted". The Commission accepted 11 of the irregular ballots. Of these, eight had votes for Negro candidates only; two split the votes between Negro and white candidates; one had votes for white candidates only. Of the 27 rejected ballots, 14 had votes for Negro candidates only; 11 split the votes; two had votes for white candidates only. In the race for mayor, an analysis of the 31 assisted ballots shows that 12 votes were cast for the white candidate and 19 for the Negro candidate. In the race for alderman, of the assisted ballots four were for all white candidates; eight were split; 19 were for all Negro candidates.

The district judge noted: "It is significant that not one witness was offered, not one witness testified that he or she was illiterate and needed assistance in casting his ballot, but refused to ask for assistance because he did not want a white person to know how his vote was cast." Of course, it would be naive to doubt that there must have been some Negroes who were unwilling to ask for aid because of a reluctance to disclose or fear of disclosing how they intended to vote. But this election was held in a fishbowl. The report of the federal observers is in the record. Commenting on the report the district judge said:

> "It speaks clearly and demonstrates that this election was fairly and properly held in every respect, and it is not questioned but that every person who was given assistance was assisted fairly and impartially with the ballot in each instance being marked in exact accord with the voter's wishes."

II.

The larger issue is whether the refusal of the Election Commissioners to appoint two Negro officials to render voting aid was a failure to provide "adequate assistance" to illiterates as required by a proper construction of Voting Rights Act of 1965.

This requirement of voter assistance stems from the Voting Rights Act, specifically 42 U.S.C.A. §1973(l)(c)(1) which defines the terms "vote" and "voting" as including "all action necessary to make a vote effective . . ." As of the three-judge court said in *United States* v. *State of Louisiana*, E. D. La. 1966, 265 F. Supp. 703, 708, *aff'd* —— S. Ct. ——:

*Appendix A*

> "We cannot impute to Congress the self-defeating notion that an illiterate has the right [to] pull the lever of a voting machine, but not the right to know for whom he pulls the lever."

In light of this requirement, it becomes

> ". . . the duty and responsibility of the precinct officials at each election to provide to each illiterate voter who may request it such reasonable assistance as may be necessary to permit such voter to cast his ballot in accordance with the voter's own decision." United States v. State of Mississippi, S. D. Mississippi 1966, 256 F. Supp. 344, 349.

The appellants' position, then, is that the use of only white poll assisters was not "reasonable assistance" in the circumstances prevailing at the Sunflower election.

The Sunflower election was governed by the Declaratory Judgment entered in the case of *United States* v. *The State of Mississippi, supra,* and not by any Mississippi statute. The Mississippi statute dealing with poll assistance was repealed in 1965. This state provided:

> "§3273. Illiterate voter to have aid.
>
> A voter who declares to the managers of the election that by reason of inability to read he is unable to mark his ballot, if the same be true, shall, upon request, have the assistance of a manager in the marking thereof; and the managers shall designate one of their number for the purpose, who shall note on the back of the ballot that it was marked by his assistance; but he shall not otherwise give information in regard to the same."

*Appendix A*

The action of the Sunflower Election Commissioners, however, was in compliance with the statute as it stood before its repeal. In light of the order in *United States* v. *State of Louisiana, supra,* which was tailored to the precise terms of a *repealed* Louisiana voter assistance statute, the action of the Election Commissioners in the present case, tailored to the terms of a repealed Mississippi statute, would appear to be reasonable.

Voters may be motivated by reasons other than fear for not seeking voter assistance, and they have at their disposal a variety of measures to cast their votes without it. Thus, in *United States* v. *State of Louisiana,* E. D. Louisiana, 265 F. Supp. 703, 715, the court said:

> "There are varying degrees of illiteracy, and varying degrees of voter intelligence among functionally illiterate electors. Many illiterates are able to respond to symbols and numbers; others will memorize the positions on the ballot of those for whom they wish to vote. Still others, even if unable to do these things, are willing to take their chances rather than reveal their choices to polling officials. Nonetheless, those few voters who do not trust their own ability to cast a ballot effectively and are willing to seek assistance are, under the Voting Rights of Act of 1965 as we read it, entitled to that assistance."

The Act requires that voters be apprised of their right to assistance, not that they be induced to accept it. In the Sunflower election, voters were apprised of their right and each was informed that he could request a federal observer to be with him in the voting booth to check the quality of assistance rendered by the election official.

On the cold record before us, the attitude of Sunflower's Election Commissioners may have been shoddy, but

it does not justify the "drastic, if not staggering" procedure (*Bell* v. *Southwell,* 5 Cir. 1967, 376 F. 2d 659) of a federal court's voiding a state election. Such "drastic" measures are properly reserved for cases involving serious violations of voting rights. *Hamer* v. *Campbell, supra; McGill* v. *Ryals,* M. D. Alabama, 253 F. Supp. 374.

III.

The plaintiffs also charged that the Election Commissioners used segregated voting lines by giving preference to individual white voters over Negro voters standing in line. The evidence is conflicting. Two witnesses for the plaintiffs testified that while Negroes were waiting in line, white were admitted to the polling place without any wait at all. A witness for the defendants employed as bailiff during the Sunflower election, denied the existence of segregated voting lines. He testified that on one occasion he did escort a white voter into the polling place ahead of some Negroes, but that was because the individual concerned was a newspaperman and not a voter. This witness admitted that on two other occasions he had escorted white voters into the polling place, but he insisted that he received permission to do so from the voters in line. One of these preferred voters was a nurse said to be urgently needed; two were a salesman and his wife who worked out of town. The district court concluded that the claim of segregated voting lines was "not sustained by the evidence." The court noted the absence of any testimony to this effect by the federal observers or members of the news media, and the further fact that of 190 Negroes in Sunflower eligible to vote in the May 2 election, more than 180 participated.

* * *

Taking the record, as a whole, we cannot say that the findings of the district court were clearly erroneous.

The judgment is AFFIRMED.

## APPENDIX B

### Order Overruling Plaintiffs' Motion to Set Aside Election

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

No. GC6522

MRS. FANNIE LOU HAMER, *et al.*,

Plaintiffs,

*v.*

SAM J. ELY, JR., *et al.*,

Defendants.

For the reasons shown in the memorandum opinion this day released, it is,

ORDERED:

Plaintiffs' motion to set aside the election of May 2, 1967, held under order of this court for the election of municipal officers in the Town of Sunflower, Mississippi, shall be, and the same hereby is, denied and overruled.

This the 22d day of December, 1967.

s/ CLAUDE F. CLAYTON
Claude F. Clayton
*United States Circuit Judge*
Sitting by Special Designation
as District Judge

# APPENDIX C

## Memorandum Opinion of the United States District Court

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

No. GC6522

MRS. FANNIE LOU HAMER, *et al.*,

Plaintiffs,

*v.*

SAM J. ELY, JR., *et al.*,

Defendants.

In accordance with the mandate of the Court of Appeals [*Hamer* v. *Campbell,* 358 F. 2d 215 (5 Cir. 1966)], general elections for municipal officers were held under order of this court on May 2, 1967, in Sunflower and Moorhead, Mississippi. On May 11, 1967, plaintiffs moved to set aside the results of this election as to the Town of Sunflower. After a hearing on the motion, it is now for disposition on briefs. Two issues are for decision.

Issue I is whether, vel non, the election commissioners' refusal to appoint a Negro official to aid illiterate Negro voters deprived such voters of their right to vote free from racial discrimination contrary to the Fifteenth Amendment, and,

*Appendix C*

Issue II is whether, vel non, racially segregated voting lines were maintained so as to give preference to white voters over Negro voters standing in line?

I.

Until the night before the election, plaintiffs believed in good faith that the election commissioners would name one Negro election official to assist Negro illiterate voters. Associate counsel for defendants (an Assistant Attorney General for the state) so understood and had advised plaintiffs of such understanding.

But, at their meeting the night before the election, the election commissioners declined so to do, and defendants learned of this decision at a mass meeting which they were having in preparation for the election was breaking up. Leaders and attorneys for plaintiffs were unable to get news of what, to them, was a change in the situation to all of the Negro voters. This caused some confusion and resulted in misunderstanding.

It must be borne in mind, however, that the name of only one person was proposed to the election commissioners by plaintiffs. This was Joseph Harris, a Negro, who according to his own testimony was not a registered voter in the Town of Sunflower and was the campaign manager for five of the Negro candidates for alderman and the one Negro candidate for mayor. His primary interest seems to have been to obtain the election of these six Negro candidates, for whom he was campaign manager, rather than to aid and protect illiterate Negro voters in the exercise of their rights to vote. At one time, he went with a group to persuade a Negro who had quali-

fied as a candidate for alderman to withdraw from the race.[1]

Pertinent guide lines here are as stated in *United States* v. *Mississippi*, 256 F. Supp. 344 (D. C. Miss. 1966), in this language:

> It is the duty and responsibility of the precinct officials at such election to provide to each *illiterate* voter who may request it such reasonable assistance as may be necessary to permit such voter to cast his ballot in accordance with the voter's own decision. (Emphasis added.)

In essence, it is plaintiffs' argument that because Joseph Harris was not permitted to aid Negro illiterate voters, many of them attempted to cast their ballots without aid, rather than ask for aid by the officials who were white, so as to prevent the white community from knowing how they voted. In support of this, they point to the fact that there were 27 irregular ballots which were rejected by the election commission on its final canvass of the returns. There is nothing in this record to indicate whether these rejected ballots were cast by Negroes or by whites. Plaintiffs suppose that they were all cast by Negroes, but this court cannot so find or suppose. Analysis of the rejected irregular ballots shows that 14 had votes for Negro candidates only; 11 had votes split between Negro and white candidates and 2 had votes for only white candidates.

---

[1] He was present all day in the polling place and was an election official.

*Appendix C*

It is significant that not one witness was offered, not one witness testified that he or she was illiterate and needed assistance in casting his ballot, but refused to ask for assistance because he did not want a white person to know how his vote was cast. Plaintiffs assume that this was the situation. But, this court cannot so assume or decide.

In the race for mayor, analysis of the assisted ballots shows that 12 votes were cast for the white candidate and 19 were cast for the Negro candidate. In the race for alderman, 4 votes were for all white candidates; 19 were for all Negro candidates and 8 were split between White and Negro candidates.

One of the assisted ballots was rejected because the voter insisted on voting for six candidates for alderman, after being advised that to do so would void his ballot, since only five aldermen were being elected. A federal observer was present in the booth when this was done and verified to the election commission that this man had been properly instructed by the precinct official who assisted him.

Moreover, this election was observed from start to finish by a team of federal observers and by two attorneys representing the Department of Justice of the United States. The report of these observers is in the record and before the court on plaintiffs' motion. It speaks clearly and demonstrates that this election was fairly and properly held in every respect, and it is not questioned but that every person who was given assistance was assisted fairly and impartially with the ballot in each instance being marked in exact accord with the voter's wishes.

*Appendix C*

Even if the burden of proof rested with defendants, which, of course, it does not, this court would be compelled to find, as it now does, that this election was conducted in a completely fair, objective way and that the results thereof truly represent the will of a majority who voted that day.

II.

Plaintiffs' second claim that segregated lines were maintained outside the polling place is not sustained by the evidence. Even if it could be said that there were some Negro voters who though racial segregation was being practiced with respect to those who were waiting outside the polling place for an opportunity to vote, there is no evidence of any kind to suggest that there was anything of a coercive nature which had any effect on the way any Negro voted. Approximately 190 Negroes were eligible to vote in this election and *more than 180 participated.*

Plaintiffs attempt to equate the situation in Sunflower during this election with the situation which existed in Sumter County, Georgia, as reported in *Bell* v. *Southwell,* 376 F. 2d 659 (5 Cir. 1967). This simply will not do. At Sunflower election day, there were three federal observers present *inside the polling place,* and a team captain who visited this election from time to time during the day. Additionally, there were two attorneys from the Department of Justice of the United States in this general area during the entire day whose primary concern was to see that this election and the companion election in Moorhead were conducted properly.[2] There was

[2] It is also noted that attorneys for plaintiffs and for defendants were also on the scene here.

national interest in these elections, and cameramen from national television networks were present. Reporters for most of the wire services and for other news media were also present. It is incredible, if there is any real basis for plaintiffs' claims that the lines were racially segregated, that none of these disinterested people so testified, and that none of the federal observers or personnel from the Department of Justice made any complaint of any sort.

III.

Plaintiffs have failed to carry their burden to show that there was any unfairness, racial or otherwise, in the conduct of this election, but on the contrary, the evidence is virtually all the other way. Hence, this court must conclude, as a matter of law, that plaintiffs are not entitled to have this election cast aside or to have a new election held for this municipality.

An order will be entered in accordance with this opinion.

This the 22d day of December, 1967.

/s/ CLAUDE F. CLAYTON
Claude F. Clayton
United States Circuit Judge
Sitting by Special Designation
as District Judge.

# APPENDIX D

## Relevant Statute

42 U.S.C. 1973

Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites.

No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

42 U.S.C. 1973 l (c)(1)

Definitions

The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special or general election including, but not limited to registration, listing pursuant to this subchapter, or other action required by law prerequisites to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

PREME COURT, U. S.

FILED
NOV 10 1969
JOHN F. DAVIS, CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

## No. 318

MRS. FANNIE LOU HAMER et al.,
*Petitioners,*

vs.

SAM J. ELY, JR. et al.,
*Respondents.*

## RESPONSE OF RESPONDENTS TO PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

# SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1969

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## No. 318

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MRS. FANNIE LOU HAMER et al.,
*Petitioners,*

vs.

SAM J. ELY, JR. et al.,
*Respondents.*

---

**RESPONSE OF RESPONDENTS TO PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT**

On February 21, 1967, the United States District Court for the Northern District of Mississippi, pursuant to the direction of the Court of Appeals for the Fifth Circuit in Hamer v. Campbell, 358 F.2d 215, entered an Order setting

aside the primary and general elections held in the Town of Sunflower, Mississippi and ordered a new general election to be held on May 2, 1967. This new election was for the choosing of a mayor, five Aldermen and a Town Clerk to fill the unexpired terms of those officers then holding offices in Sunflower.

The new election was held pursuant to the court order. On May 11, 1967, Plaintiffs-Petitioners filed a motion with the District Court to set aside the election held on May 2nd and to order a new election. They attached certain affidavits to their motion and asked for a hearing. A full hearing was held by the District Court on August 30, 1967. Following that hearing and a submission of Briefs, the District Court issued its opinion in which it made a detailed finding of facts and its conclusions of law. Appendix C, pages 11A-16A, Plaintiffs'-Petitioners' Petition for Writ of Certiorari.

On appeal to the Circuit Court of Appeals for the Fifth Circuit, Petitioners primarily urged reversal of the District Court because only white election officials assisted illiterate voters and because, as they maintained, segregated voting lines were permitted for persons waiting in line to vote. The District Court found, as a matter of fact, that there were no segregated voting lines. This finding of fact, the Court of Appeals agreed with.

Petitioners apparently now have abandoned their claim that segregated voting lines were permitted and do not include that claim in the questions presented. Page 2, Petition for Certiorari.

The only relief sought by Plaintiffs-Petitioners in the District Court and in the Court of Appeals was the setting aside of the election of May 2, 1967, and ordering of a new election. The granting of that relief is now a moot question.

The election conducted on May 2, 1967, was for the election of officers to fill the unexpired terms of those municipal officers then holding offices. Section 3374-62 of the Mississippi Code of 1942 provides for the election of all municipal officers every four years. Section 3374-63 of the Mississippi Code of 1942 provides for primary elections to precede the general elections. A copy of these two sections is attached as Exhibit "A" to this response for the benefit of the Court.

Pursuant to Section 3374-62, the terms of the officers elected in the Town of Sunflower at the May 2, 1967 election expired on the first Monday of July, 1969. On the second Tuesday of May (May 13, 1969) a new primary election was held in the Town of Sunflower pursuant to Section 3374-63. At that election there were twelve candidates for the five Aldermen positions and two candidates for the position of Mayor. Six of the candidates for Aldermen were Negroes including two of the Plaintiffs-Petitioners. At the election, two Negroes served as election officials and assisted any Negro illiterate voters who requested their assistance. At the request of the officials of the Town of Sunflower, federal observers were present at this election. No Negro was elected. Following this primary election, pursuant to Section 3374-62, a general election was held on June 3, 1969, and the officers elected took office on the first Monday of July, 1969. Plaintiffs-Petitioners have voiced no objection to that election, although they participated in it.

Therefore, what Plaintiffs-Petitioners now seek is simply an advisory opinion from this Court.

## CONCLUSION

The finding of facts and conclusions of law by the District Court and the Opinion of the Fifth Circuit are so complete and in such detail that it is felt that any further

discussion in this response would be redundant and unnecessary duplication. The only relief which Petitioners could receive at the hands of this Court is merely an advisory opinion which this Court has consistently refused to give. A Declaratory Judgment is not involved. Therefore, we earnestly submit that the petition for certiorari should be denied.

Respectfully submitted,

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By: .....
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*Of Counsel for Respondents*

**EXHIBIT "A"**

CROSS REFERENCES: Registration and Elections §§ 3206, 3210 et seq., 3260.

REFERENCES: 18 Am Jur 231, Elections §§ 82 et seq.

Annotations

Nonregistration as affecting legality of votes cast by persons otherwise qualified. 101 ALR 657.

**§ 3374-62. Municipal elections—time for holding.**

A general municipal election shall be held in each city, town or village on the first Tuesday after the first Monday of June, 1953, and every four years thereafter, for the election of all municipal officers elected by the people. The officers elected shall qualify and enter upon the discharge of their duties on the first Monday of July after such general election, and shall hold their offices for a term of four years and until their successors are duly elected and qualified.

The terms of all municipal officers whose terms of office would otherwise expire within twelve months prior to the first Monday in July, 1953, including those officers elected for a two-year term, are hereby extended until the first Monday in July, 1953, and their successors shall be elected on the first Tuesday after the first Monday in June, 1953, as provided in the first paragraph of this section, and thereafter the terms of office of all elected municipal officers shall be for a period of four years. All municipalities which presently elect their officers for a period of two years shall elect such officers, as provided by law, in December 1950, and section 3764, code of 1942, is hereby continued in effect for such purpose, and such officers so elected shall hold office until the first Monday of July, 1953. It is the purpose of this act, however, to provide that the municipal

officers who would otherwise be elected in the year 1952 shall not be elected in such year, but shall be elected on the first Tuesday after the first Monday in June, 1953, as is herein provided. [Supersedes § 3764, Code of 1942.]

SOURCES: Codes, 1930, § 2597; Laws, 1922, ch. 219; 1928, ch. 184; 1932, ch. 226; 1936, ch. 281; 1950, ch. 491, § 62.

CROSS REFERENCES: §§ 3374-35, 3374-55, 3374-108, this title: Officers § 4028; Primary Elections §§ 3152 et seq.

JUDICIAL DECISIONS UNDER REPEALED STATUTES

Provision for election in 1932, and every four years thereafter, held applicable to municipalities which had adopted commission form of government before Code became effective. State ex rel. Colmer v. Benvenutti, 162 M 313, 137 So 537.

**§ 3374-63. Primary elections.**

Except as may be otherwise provided by law, all candidates for municipal offices to be voted for at any general election shall be nominated at a party primary election, and no name or names shall be placed upon the official ballot at such general election other than those selected in the manner prescribed herein. Such primary elections shall be held on the second Tuesday in May preceding the general election, and, in the event a second primary shall be necessary, it shall be held on the third Tuesday in May preceding the general election. All primary elections in municipalities shall be held and conducted in the same manner as is provided by law for state and county primary elections. [Supersedes § 3795, Code of 1942.]

SOURCES: Codes, Hemingway's 1917, § 6043; 1930, § 2631; Laws, 1912, ch. 120; 1950, ch. 491, § 63.

CROSS REFERENCES: Primary Elections §§ 3152 et seq.